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Mr. Justice Black: The Man and His Opinions, by John P. Frank

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BOOK REVIEWS

MR. JUSTICE BLACK: *The Man and His Opinions*. By John P. Frank,* with an Introduction by Charles A. Beard. New York: Alfred A. Knopf, Inc., 1949. Pp. xix, 357. \$4.00.

In a good and ancient book it is written, "By their fruits ye shall know them." John P. Frank in *Mr. Justice Black: The Man and His Opinions* has very effectively sketched the life of this remarkable man to give you what the newspaper men call "background" for the understanding of his opinions. Professor Charles A. Beard in the preface laments the fact that when he was a student of constitutional law there was no study of the social origins and intellectual processes of the justices who told us by their opinions what the Constitution meant. Mr. Frank has rendered a service to the student and to the practitioner in presenting at this time his most interesting and readable book. Mr. Frank, who served for a time during the war as Justice Black's law clerk and who has since solidly established himself as a writer and teacher of law, is well qualified to write about his subject. While Mr. Frank is an ardent admirer of Justice Black, he is no Boswell—he paints his portrait "warts and all."

Justice Black is and will ever be a controversial figure. He never drifts with the current. His audience is sharply divided; because he never leaves you in doubt about where he stands, it is inevitable that you support or oppose him. His adherents are immediately attracted by his briar-sharp intellect, his forthright, courageous championship of causes he believes in, and his prodigious capacity for work. Even his opponents concede him these virtues.

Justice Black came to the bench, as Mr. Frank points out, under the greatest cloud and the most vicious personal attack ever made upon an appointee to the Supreme Court, not excepting the incredible attack upon Justice Brandeis. The assault upon Justice Black was as shabby and unwarranted as that upon Justice Brandeis. If I understand Kluxers, and I think I do after living through their "reign" in Indiana in the 1920's, there is none of their arrogance

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or bigotry about Justice Black, whom I have known long and intimately. The forces opposed to him were not concerned with his "joiner proclivities" down in Alabama, which were legion, or his Kluxer philosophy, which did not exist. They were concerned with what he thought about the social and economic questions of the day. His views on those subjects they did not like.

With his roots deep in the clay soil of the eroded hills of Alabama and his sensitive nature scarred by the inequalities and injustices he observed all around him, Black came up in his profession and in politics at death grips with the forces responsible for the conditions about him. As police judge, prosecutor, lawyer, and senator, he fought the battles of the little fellow against prejudice, oppression, and the overbearing position of entrenched wealth represented by the utilities, the steel and coal corporations, the railroads, and the planters. It was a foregone conclusion that when Justice Black went on the bench his sympathy for the underdog and his intense love of democracy would lead him to fight there as he had fought before for liberty, humanity, and a wide berth for the processes of democracy to work both through the state legislatures and the Congress. It was clear that his eye would be focused always upon the personal liberties of the individual so that neither the state nor the federal authorities encroached upon such liberties without warrant.

Mr. Frank, after his biography of the Justice, treats some of his most significant Court opinions and dissents. Preceding each, he summarizes the issues involved, the principal points decided, and how the Court stood on the case. Then he sets forth the heart of the opinion in condensed form, so that it reads like an essay on the subject dealt with in the opinion. Justice Black's opinions lend themselves to this treatment as they are always succinct and clear. Like a skilled surgeon with his scalpel, he cuts directly to the heart of the matter and lays bare the problem in a few bold strokes. You read the opinion thus treated with easy understanding; you may not agree with Justice Black, but you always know what he is talking about. In my own experience, I often read an opinion of another member of the Court and pass on to a dissent by Black before I understand what the case is all about. Black has the happy faculty of pointing up "Hamlet" in a few short, crisp sentences.

Mr. Frank has not attempted to report a great many of the Justice's opinions but has selected outstanding ones which illuminate the course which the Justice has set. They are presented under two main headings. Under the first, Control of the Economy, are the subdivisions Extent of Federal Power, Extent of State Power, and Problems of Regulation. The second heading is Civil Rights, with subheadings of Basic Theory, Speech, Press, Religion, Fair Trial, Marriage and Divorce, and Aliens.

The limits of this review will not permit me even to comment upon each of the cited decisions. You will find Justice Black giving the boldest sweep to state and federal legislatures and their administrative creatures, even to the point of denying the Court's right to review the rate orders of commissions on constitutional grounds. Legislative and administrative acts that do not invade an individual's civil liberties are most sympathetically treated by him. Even when Congress has authorized review to determine whether there is substantial evidence to support findings, Justice Black has been most ingenious in finding reasons to support the order. He has been consistent in his views in upholding all fact-finding agencies, including juries, as witness his decisions under the Federal Employers' Liability Act and his dissent in the *Galloway* case.¹ Justice Black has never quite said so in an opinion, but I think he believes that jurors are as capable as judges in fact finding, and if a case is triable by a jury, it should never be taken from the jury.² The findings of a commission or of a jury are to be respected.

Under the heading of "Civil Rights" Justice Black soars to his greatest heights and carries with him a majority of

1. *Galloway v. United States*, 319 U. S. 372, 396 (1943).

2. Thus in the *Galloway* case, *supra* note 1 at 406, Justice Black stated that in his view the following instruction, taken from *Tarter v. United States*, 17 F. Supp. 691, 692-3 (1937), indicates the "minimum meaning" of the Seventh Amendment:

"The Seventh Amendment to the Constitution guarantees a jury trial in law cases, where there is substantial evidence to support the claim of the plaintiff in an action. If a single witness testifies to a fact sustaining the issue between the parties, or if reasoning minds might reach different conclusions from the testimony of a single witness, one of which would substantially support the issue of the contending party, the issue must be left to the jury. Trial by jury is a fundamental guaranty of the rights of the people, and judges should not search the evidence with meticulous care to deprive litigants of jury trials."

his colleagues, especially in his opinions dealing with fair trials, the selection of juries, the handling of confessions, and the providing for counsel. In *Johnson v. Zerbst*³ he said the constitutional provision for counsel was jurisdictional, and the failure to have counsel provided at each step of the case in a federal court, in the absence of a clear showing that the defendant 'intelligently and understandingly waived the right, nullified the court's action and entitled the defendant to be released from the sentence he was serving. Such denial of counsel, he said, violated the Sixth Amendment to the Federal Constitution. In *Betts v. Brady*,⁴ in which a Maryland state court had refused counsel, the majority held that the Sixth Amendment, at least in a non-capital case, was not drawn into the ambit of the Fourteenth Amendment, and that the state violated no federal right when it denied counsel. Justice Black dissented for himself and two others, taking the broad position that the Fourteenth Amendment made secure against invasion by the state all the rights of individuals guaranteed by the Federal Bill of Rights. On that broad proposition, the Court stands five to four, with Justice Black leading the minority. The majority freely admits Justice Black's position as to the First Amendment to the Federal Constitution and probably as to the Sixth Amendment in a capital case. Why the Court goes part of the way but not all the way with Justice Black is, to say the least, illogical.

When you have read the civil rights cases Mr. Frank cites, you will, I think, be stimulated to read all that this great liberal justice has said concerning civil rights. I know he was only a police judge. I heard his traducers scoffingly say so! Read *Chambers v. Florida*⁵ and you will read the classic burning words of a truly great judge, words that will echo down the corridors of time as long as courts shall stand to administer "Justice under the law." Don't take my word for it. I quote from the historian Beard: "In his opinion which will ring with power as long as liberty and justice are cherished in our country, Justice Black asserted with moderated eloquence great American principles of human

3. 304 U. S. 458 (1938).

4. 316 U. S. 455 (1942).

5. 309 U. S. 227 (1940).

liberty. The whole document ought to be read by all citizens who care for the perpetuity of the Republic."

John Frank has distinguished himself as a writer and has rendered a service to students of the law and courts, as well as the bar, in giving us *Mr. Justice Black: The Man and His Opinions*.

Sherman Minton†